

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case Number: 03-80391

v.

HONORABLE AVERN COHN

DONOVAN JAY SMITH,

Defendant

/

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION (Doc. 73)

I.

This is a criminal case. On April 26, 2010, defendant filed a pro se motion for reduction of sentence under 18 U.S.C. § 3582, arguing that his sentence should be reduced based on Amendment 706 relating to crack cocaine. The Court denied the motion on the grounds that because defendant was sentenced to the 120 month mandatory minimum for his crack cocaine offense, Amendment 706 does not apply to him. See Order filed May 3, 2010 (Doc. 71). Defendant then filed a motion for reconsideration, which is now before the Court.¹ For the reasons that follow, the motion is DENIED.

II.

As an initial matter, defendant's motion is untimely. Motions for reconsideration must be filed within 14 days after entry of the order. See E.D. Mich. LR 7.1(h)(1).

¹The case was reassigned to the undersigned on December 22, 2010 pursuant to 10-AO-037.

Defendant's motion, filed on December 10, 2010, is well past 14 days. While defendant says he did not timely receive a copy of the Court's May 3, 2010 order, defendant does not state when he received the order. In any event, defendant's motion fails on the merits. E.D. Mich LR 7.1(h)(3) provides in relevant part:

Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

Defendant has not satisfied this standard.

18 U.S.C. § 3582(c) provides in relevant part:

- (1) In General.-In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) Exclusions.-A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if-
 - (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
 - (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

As explained in the order denying defendant's § 3582 motion, he is not entitled to any benefit from the crack cocaine amendment because he was sentenced to the mandatory minimum of 120 months on that count. In other words, defendant is not eligible for a sentence reduction under § 3582(c)(2) because the Guideline range "applicable to" him was not lowered by the crack cocaine amendment. Amendment 706

did lower the Guidelines range that would have been applicable to defendant had he not been subject to the statutory mandatory minimum 120 month prison sentence. However, because defendant was subject to the statutory mandatory minimum sentence, the new crack cocaine Guidelines range was not "applicable to" him. See United States v. Gudger, 2010 WL 3034461 (6th Cir. Aug. 2, 2010).

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: January 5, 2011

I hereby certify that a copy of the foregoing document was mailed to Donovan Jay Smith, #31548-039, MCFP Springfield, P.O. Box 4000, Springfield, MO 65801-4000 and the attorneys of record on this date, January 5, 2011, by electronic and/or ordinary mail.

S/Julie Owens
Case Manager, (313) 234-5160